Supreme Court, U. S.
FILED
DEC 6 1999
CLERK

No. 99-598

In the

SUPREME COURT OF THE UNITED STATES

PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC COMPANY, LLC, a Delaware corporation; and SALMON CREEK CORPORATION, a Delaware corporation,
Petitioners,

v.

MARBLED MURRELET *(Brachyramphus marmoratus)*; NORTHERN SPOTTED OWL *(Strix occidentallis caurina)*; and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF THE **AMERICAN FOREST & PAPER ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA FORESTRY ASSOCIATION, CALIFORNIA MINING ASSOCIATION, CONSTRUCTION MATERIALS ASSOCIATION OF CALIFORNIA, MICHIGAN MANUFACTURERS ASSOCIATION, WESTERN GROWERS ASSOCIATION and WESTERN STATES PETROLEUM ASSOCIATION IN SUPPORT OF PETITIONERS**

Scott M. DuBoff*
Jeffrey D. Komarow
Wright & Talisman, P.C.
1200 G Street, N.W., Suite 600
Washington, D.C. 20005-3802
(202) 393-1200
Counsel for Amici Curiae

*Counsel of Record

(Additional Counsel Listed on Inside Cover)

William R. Murray
1111 19th Street, NW, Suite 800
Washington, DC 20036
Counsel for American Forest & Paper Association

Ian Amundson
1331 Pennsylvania Ave., NW
Washington, DC 20005
Counsel for National Association of Manufacturers

John Braley
1221 H Street
Sacramento, CA 95814
Counsel for California Cattlemen's Association

Fred Maine
1201 K Street, 12th Floor
Sacramento, CA 95814-3906
Counsel for California Chamber of Commerce

Nancy M. McDonough
2300 River Plaza Drive
Sacramento, CA 95833
Counsel for California Farm Bureau Federation

Mark S. Rentz
300 Capitol Mall, Suite 350
Sacramento, CA 95814
Counsel for California Forestry Association

Adam Harper
One Capitol Mall, Suite 220
Sacramento, CA 95814-3229
Counsel for California Mining Association

Pat Mitchell
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
Counsel for Construction Materials Association of California

J. Walker Henry
1001 Woodward Avenue
Detroit, MI 48226-1962
Counsel for Michigan Manufacturers Association

Jasper E. Hempel
1005 12th Street, Suite A
Sacramento, CA 95814
Counsel for Western Growers Association

Gregory R. McClintock
350 S. Grand Ave., 25th Floor
Los Angeles, CA 90071
Counsel for Western States Petroleum Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI* 3

REASONS FOR GRANTING THE WRIT 10

A. The Judicial Standard For Fee Shifting To Prevailing Citizen Suit Defendants Is An Important Issue That Requires The Court's Attention 10

B. The Ninth Circuit Failed To Follow The Analysis Set Forth In The Court's *Fogerty* Decision 12

C. The Ninth Circuit's Dual Standard Is Inconsistent With Congress' Determination That Citizen Suits Are Limited To A Supplementary, Interstitial Role In Environmental Enforcement 15

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE(S)

CASES

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y
421 U.S. 240 (1975). 10

Baker v. Dandar
158 F.3d 516 (11th Cir. 1998). 18

Carson-Truckee Water Conservancy Dist. v. Secretary of the Interior,
748 F.2d 523 (9th Cir. 1984). 11, 12, 14

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978). . . . . passim

Doering v. Union County Bd. of Chosen Freeholders,
857 F.2d 191 (3d Cir. 1988). 18

Fogerty v. Fantasy, Inc.,
510 U.S. 517 (1994). . . . . passim

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,
484 U.S. 49 (1987). 15, 16, 17

Hallstrom v. Tillamook County,
493 U.S. 20 (1989). 9, 15, 16, 17

Hensley v. Eckerhart,
461 U.S. 424 (1983). 18

Newman v. Piggie Park Enters., Inc.,
390 U.S. 400 (1968). 15

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,
478 U.S. 546 (1986). 12, 14

Razore v. Tulalip Tribes,
66 F.3d 236 (9th Cir. 1995). 9

Ruckelshaus v. Sierra Club,
463 U.S. 680 (1983). 8, 9, 16

Sierra Club v. Shell Oil Co.,
817 F.2d 1169 (5th Cir. 1987) 9

STATUTES, RULES AND REGULATIONS

5 U.S.C. § 552b(i). 12

15 U.S.C. § 15c(d). 13
§ 4304(a). 13
§ 1692k(a)(3) 13
§ 1693m(f). 13
§ 3608(d). 13
§ 3611(d). 13
16 U.S.C. § 1531(a)(5). 18
§ 1536(a)(2). 7
§ 1538. 7
§ 1540(e). 17

§ 1540(g). 2
§ 1540(g)(2). 17
§ 1540(g)(4). . . . . passim

17 U.S.C. § 505. 10

31 U.S.C. § 3730(d)(4). 13

33 U.S.C. § 1365(d). 9

42 U.S.C. § 4321, *et seq.* 7
§ 6972(e). 9
§ 11113. 13

49 U.S.C. § 60121(b). 12

MISCELLANEOUS

110 Cong. Rec. 12724 (1964). 16

S. Rep. No. 92-414 (1971). 15

H.R. Rep. No. 94-1558 (1976). 15

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1999

No. 99-598

PACIFIC LUMBER COMPANY, a Delaware corporation; SCOTIA PACIFIC COMPANY, LLC, a Delaware corporation; and SALMON CREEK CORPORATION, a Delaware corporation,

Petitioners,

v.

MARBLED MURRELET *(Brachyramphus marmoratus)*; NORTHERN SPOTTED OWL *(Strix occidentallis caurina)*; and ENVIRONMENTAL PROTECTION INFORMATION CENTER, INC.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICI CURIAE* OF THE

AMERICAN FOREST & PAPER ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL CATTLEMEN'S BEEF ASSOCIATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA FORESTRY ASSOCIATION, CALIFORNIA MINING ASSOCIATION, CONSTRUCTION MATERIALS ASSOCIATION OF CALIFORNIA, MICHIGAN MANUFACTURERS ASSOCIATION, WESTERN GROWERS ASSOCIATION and **WESTERN STATES PETROLEUM ASSOCIATION**

IN SUPPORT OF PETITIONERS

Amici curiae American Forest & Paper Association, *et al.*, submit this brief in support of Petitioners Pacific Lumber Company, *et al.* (collectively "PALCO").[1] Their petition seeks review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Marbled Murrelet v. Babbitt*, 182 F.3d 1091 (1999) (reproduced at Pet. App. at 3a-10a).

More specifically, this case concerns a private enforcement action ("citizen suit") under section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), and that statute's "fee shifting" provision, section 11(g)(4).[2] Section 11(g)(4), like the citizen suit provisions of nearly all other federal environmental statutes, authorizes reimbursement of the prevailing litigant's legal expense by the losing party. Petitioners had been the defendants below, and earlier Ninth Circuit decisions addressing the merits ruled in their favor. The court of appeals found that the actions by PALCO at issue in the case had advanced the purposes of the ESA and dismissed the opposing claims of Respondents Environmental Protection Information Center, Inc., *et al.* (collectively "EPIC," the plaintiffs below) as untenable. Thereafter, PALCO, as the prevailing party, sought reimbursement of its attorney's fees. Although ESA section 11(g)(4) does not describe different standards for reimbursement of attorney's fees incurred by prevailing plaintiffs as opposed to prevailing defendants, and the Ninth Circuit's standard for fee shifting in favor of a prevailing citizen suit plaintiff merely requires that the suit furthered the goals of the underlying statute, the Ninth Circuit ruled that PALCO would not be eligible for

---

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae* and their members have made a monetary contribution to the preparation or submission of this brief. The Petitioners and Respondents have consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

[2] *See* 16 U.S.C. § 1540(g)(4) (the district court's final order "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate").

reimbursement of its legal expense unless it could prove that EPIC's citizen suit was frivolous and without foundation. Pet. App. at 6a. The Ninth Circuit relied on this Court's *Christiansburg* decision and the so-called "dual" standard for fee shifting in favor of prevailing defendants in civil rights cases. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *see also Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 520-21 (1994).

Like Petitioners, *amici* submit that the Ninth Circuit's ruling is erroneous, misconstrues decisions of this Court and contradicts Congress' intent regarding the role of citizen suit enforcement under the ESA. Moreover, the implications of the Ninth Circuit's decision clearly transcend the ESA and can seriously distort citizen suit enforcement under essentially all federal environmental laws. Review by this Court is necessary to address these important matters.

STATEMENT OF INTEREST OF *AMICI*

A. *Amici* consist of voluntary business associations representing a broad spectrum of commerce and industry in the United States.

Amicus American Forest & Paper Association ("AF&PA") is the national trade association of the forest, pulp, paper, paperboard and wood products industry. AF&PA represents approximately 400 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recycled fiber; and produce solid wood products. With an annual payroll of approximately $46 billion, this vital national industry accounts for over 8% of the total United States manufacturing output, employs some 1.4 million people and ranks among the top ten manufacturing employers in 46 states.

Amicus National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade asso-

ciation. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM through its Associations Council and National Industrial Council.

Amicus National Cattlemen's Beef Association ("NCBA") is the national marketing and trade association for America's approximately one million cattle farmers and ranchers. NCBA is a consumer-focused and producer-directed organization representing the largest segment of the nation's food and fiber industry. Through the NCBA, cattlemen work to create positive business conditions and provide stewardship for protection of the land from which they make their living while providing consumers with the finest beef products.

Another *amicus*, California Cattlemen's Association ("CCA"), is the principal advocate for California's $1.32 billion beef cattle industry, and represents CCA's members—from rangeland producers to feedlot operators—on a variety of legislative, regulatory affairs and judicial matters. Nearly 40 million acres of California rangeland are owned or, in the case of public rangeland, managed by CCA members (half of that acreage is privately owned). CCA members are dedicated to the stewardship of California's natural resources and the production of wholesome beef products for the state, national and international markets.

Amicus California Chamber of Commerce ("California Chamber") is a statewide business association with more than 11,000 members, both individual and corporate, who represent virtually every economic interest in the state. The California Chamber represents its members (90% of which are small- or medium-sized businesses) before the California legislature, local governments and the courts on a broad spectrum of legislative, regulatory and judicial matters affecting its members.

Amicus California Farm Bureau Federation ("CFBF") consists of 53 county Farm Bureaus, through which it represents approximately 40,000 individual member farm and ranch families in 56 California counties. CFBF's purposes are, among others, to protect and advance the social, economic and educational interests of California farmers, including environmental protection. CFBF's member farmers and ranchers provide and preserve habitat for many species of plants, fish and wildlife and support such habitat by prudent resource management. More than 90% of the CFBF's family farm and ranch members qualify as small businesses under federal law, and are unable to absorb the costs of defending unmeritorious claims under the Endangered Species Act. The threat of such claims has become a powerful disincentive against providing wildlife habitat on agricultural lands in California.

The diverse membership of *amicus* California Forestry Association ("CFA") includes owners of forestland, forest products manufacturers, biomass energy producers, professional foresters, licensed loggers and wholesalers and retailers of forest products. CFA serves as a central voice for California's forest resource companies and provides a comprehensive range of services including advocacy, coalition building and strategic program development. Members manage their forestland to protect the environment and produce a sustainable yield of timber for the manufacture of forest products.

Amicus California Mining Association is a statewide organization dedicated to the advancement of responsible mining, consistent with protection of the environment and other natural resources, and the education of the public to the vital roles minerals and mining play in our society. The mining industry directly contributes over $3 billion to the California economy each year.

Amicus Construction Materials Association of California ("CMAC") represents aggregate and ready mix producers in

Northern California. CMAC was formed in February 1998 and represents the largest geographic area of any similar organization in the United States. CMAC members provide aggregate and concrete products for roads and highways, residential and commercial buildings and public and private water supply systems. CMAC is an advocate for its members before various forums, including federal courts, on important issues of regulatory and economic policy.

Another of the *amici*, Michigan Manufacturers Association ("MMA"), is a business association of private Michigan employers studying matters of general interest to its members, promoting their interests and the interests of all Michigan employers and the general public in the proper administration of laws relating to its members, and otherwise promoting the general business and economic welfare of Michigan. MMA's more than 4,000 members employ 90% of the industrial work force in Michigan—over one million people. An important aspect of MMA's activities is representing its members as an *amicus curiae* in a broad range of matters before the courts.

Amicus Western Growers Association ("WGA") is an agricultural trade association whose California and Arizona-based members are growers, packers and shippers of more than half of the nation's fresh produce. WGA was formed in 1926 in California's Imperial Valley as a marketing protective organization to address escalating railroad transportation costs. Among WGA's services to its members today is representation in a variety of legislative, regulatory and judicial forums in important matters of law and policy, such as this case.

Amicus Western States Petroleum Association ("WSPA") is a trade association representing companies that produce, refine, market and transport most of the crude oil, motor fuel and other petroleum products in the western United States. One of WSPA's primary functions is to represent the interests of its members in regulatory and judicial proceedings, such as this

case, which present issues having considerable importance to the petroleum industry.

B. *Amici* and their members are committed to the goals of the ESA and all other federal and state laws for the protection of the environment. To that end, *amici's* members routinely spend vast sums. Nevertheless, just as in this case involving PALCO, *amici's* members have been (or presently are) defendants in citizen enforcement suits under the ESA or other federal environmental statutes. The citizen suit provisions of these statutes routinely provide for fee shifting, in the same manner as section 11(g)(4) of the ESA.

EPIC's suit against PALCO related to PALCO's harvesting of timber in northern California, which is subject to comprehensive regulation by the California Department of Forestry. Where a "threatened" or "listed" species under the ESA may exist within a proposed harvest area, California regulations mandate procedures in a timber harvest plan to avoid a "take" of those species. *See* 16 U.S.C. § 1538. The adequacy of the procedures must be verified in advance, and one method for doing so is to obtain the concurrence of the U.S. Fish and Wildlife Service ("FWS") that the procedures will avoid such "takes." In this case, FWS reviewed PALCO's harvest plan and confirmed (after certain suggested modifications were made) that the plan was acceptable. In response, EPIC filed a citizen suit claiming that FWS' concurrence was "agency action" within the meaning of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2). In addition, EPIC claimed that PALCO's proposed logging operations would by definition constitute "takes" of threatened species.[3]

Reversing district court rulings, the Ninth Circuit concluded that EPIC had failed to allege any claims against PALCO (or the FWS) that were serious or a fair ground for litigation. *See* Pet.

---

[3] EPIC also claimed that FWS' concurrence was a "major federal action" under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, which would require preparation of an environmental impact statement.

App. at 5a, 45a-46a, 76a, 80a-81a, 83a. Instead, the Ninth Circuit recognized that FWS' concurrence regarding the adequacy of procedures to avoid "takes," provided in response to PALCO's request, did not transform the timber harvest plan into federal agency action, and timber harvesting on private lands remained a matter of exclusive state regulation. In addition, the Ninth Circuit emphasized that protection of endangered species had been enhanced by communication between PALCO and FWS, while the burdensome ESA section 7 procedures EPIC sought to engraft would undermine the ESA's objectives. *Id.* at 83a.

As the prevailing party, PALCO applied to the district court for recovery of its attorney's fees. The district court rejected PALCO's request, ruling that ESA citizen suits should be governed by the *Christiansburg* "dual" standard for fee shifting in civil rights cases, under which a defendant can recover its fees only where the plaintiff's lawsuit was frivolous, unreasonable or without foundation. On appeal, the Ninth Circuit agreed with the district court and ruled that *Christiansburg's* dual standard for fee shifting should extend to suits under ESA section 11(g)(4) and by implication to virtually all other environmental citizen suits.

As *amici* explain below, the dual standard that the Ninth Circuit adopted in this case for purposes of section 11(g)(4) contradicts the statute's plain meaning and is not supported by any policy objectives underlying the statute. The importance of this issue is considerable and clearly transcends the ESA. In that regard there are more than 150 fee shifting provisions in federal statutes, *see Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983), and such provisions are commonly found in antitrust, civil rights, copyright and trademark, and environmental laws. As an example, the Ninth Circuit's decision concerning the ESA directly affects the fee shifting provisions of more than a dozen other environmental statutes, each of which are virtually identi-

cal to section 11(g)(4), *id.* at 682 n.1, and are often interpreted *in pari materia*. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 23-25 (1989).

As Petitioners note (Pet. at 12-13), lower court decisions regarding fee shifting in environmental citizen suits are inconsistent. For example, *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169 (5th Cir. 1987), upheld an award of litigation costs to a prevailing defendant in reliance on 33 U.S.C. § 1365(d), the fee shifting provision of the Clean Water Act's citizen suit statute, without suggesting that different standards for such awards apply to prevailing defendants as opposed to prevailing plaintiffs (nor were such standards otherwise discussed). Other decisions interpreting the same statutory language adopt a dual standard under which a successful citizen suit plaintiff is entitled to recovery of its attorney's fees by virtue of prevailing-party status, while a successful defendant can recover its fees only by proving that the plaintiff's suit was frivolous. *See, e.g., Razore v. Tulalip Tribes*, 66 F.3d 236 (9th Cir. 1995) (interpreting fee shifting provisions of Clean Water Act, 33 U.S.C. 1365(d), and Resource Conservation and Recovery Act, 42 U.S.C. § 6972(e)). The need for clarification by this Court increases as additional statutes, such as the ESA in this case, are added to the mix. Given the frequency of environmental citizen suits, uncertainty regarding the standard for fee shifting for prevailing defendants is likely to continue to result in considerable litigation absent resolution by the Court.

REASONS FOR GRANTING THE WRIT

A. The Judicial Standard For Fee Shifting To Prevailing Citizen Suit Defendants Is An Important Issue That Requires The Court's Attention

This case provides a unique opportunity to clarify the interpretation of fee shifting statutes, which authorize district courts to depart from the "American Rule" and award attorney's fees

and other litigation costs to prevailing parties.[4] The Court should decide which of two conflicting interpretations of similar fee shifting statutes applies to the award of attorney's fees to defendants in environmental litigation.

In 1978 the Court announced in *Christiansburg* the dual standard under which plaintiffs who prevail in employment discrimination litigation under Title VII of the Civil Rights Act of 1964 are ordinarily awarded attorney's fees, but a prevailing defendant may recover such fees only if the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg*, 434 U.S. at 421. Sixteen years later in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, the Court concluded that prevailing parties in copyright litigation—plaintiffs *and* defendants—must be treated alike, and rejected the view that the Copyright Act's fee shifting provision, 17 U.S.C. § 505, either compelled or permitted the courts to look more favorably upon an attorney's fee request by a prevailing plaintiff as compared to a prevailing defendant.[5] *Fogerty* emphasized that section 505 "gives no hint that successful plaintiffs are to be treated differently than successful defendants." 510 U.S. at 522. *Fogerty* then distinguished *Christiansburg* despite the similarity in the language of the fee shifting provisions of the Copyright Act and Title VII of the Civil Rights Act. The Court noted that "a Title VII plaintiff . . . is 'the chosen instrument of Congress to vindicate "a policy [of equality] that Congress considered of the highest priority."'" *Id.* at 523 (quoting *Christiansburg*, 434 U.S. at 418). *Fogerty* further explained that

> [o]ften-times, in the civil rights context, impecunious . . . plaintiffs can ill afford to litigate their claims against de-

---

[4] The general rule in the United States is that litigants pay their own attorney's fees, absent legislation providing otherwise. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

[5] 17 U.S.C. § 505 provides that the court may award "a reasonable attorney's fee to the prevailing party as part of the costs" of a civil action under the Copyright Act.

> fendants with more resources. Congress sought to redress this balance in part, and to provide incentives for the bringing of meritorious lawsuits, by treating successful plaintiffs more favorably than successful defendants.

510 U.S. at 524. The Court found that the factors relied upon in *Christiansburg* were "absent in the case of the Copyright Act." *Id.* at 523. It also observed that Congress could not have intended to incorporate its *Christiansburg* holding into section 505 of the Copyright Act because *Christiansburg* was decided two years after Congress enacted that provision. *See id.* at 523 n.9.

Justice Thomas concurred in the *Fogerty* result but concluded that the majority's statutory analysis was flatly inconsistent with *Christiansburg*. *See id.* at 535. He reasoned that the plain language of both statutes required the application of an evenhanded rule and opined that the Court "should acknowledge that *Christiansburg* mistakenly cast aside the statutory language to give effect to equitable considerations." *Id.* at 538. Justice Thomas stated that, while *stare decisis* might counsel against overruling *Christiansburg*, he would "decline to extend *Christiansburg's* analysis to other contexts." *Id.* at 539.

The Court has not addressed the question of whether the *Christiansburg* dual standard or the *Fogerty* evenhanded standard applies to the neutrally worded fee shifting provisions of the ESA and other environmental laws, and there is inconsistency and uncertainty in the lower federal courts over which standard should apply. While *Fogerty* teaches that *Christiansburg* is the product of "important policy objectives of the civil rights statute," *id.* at 523, and certainly does not automatically apply outside the civil rights context, in this case the Ninth Circuit, without even mentioning *Fogerty*, overruled its prior decision in *Carson-Truckee Water Conservancy Dist. v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984), which had refused to apply *Christiansburg* in determining whether to award attorney's fees under the ESA. The fatal flaws in the decision

below, which this Court should correct, are the Ninth Circuit's failure to consider and apply the reasoning of *Fogerty* and its misplaced reliance on *dicta* in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986).

B. The Ninth Circuit Failed To Follow The Analysis Set Forth In The Court's *Fogerty* Decision

The Ninth Circuit failed at the outset to follow the most basic teaching of *Fogerty*, that is, to begin its analysis by examining the language of the statute. In that regard, section 11(g)(4) of the ESA is unabashedly neutral and makes no distinction between prevailing plaintiffs and defendants. The statute, moreover, is clear in providing that the award of attorney's fees and other costs is discretionary—fees "may" be awarded "where appropriate." In short, just as the Court found in *Fogerty* with respect to the Copyright Act, the fee shifting provision of the ESA "gives no hint that successful plaintiffs are to be treated differently from successful defendants." 510 U.S. at 522. Indeed, in *Carson-Truckee*, based on a similar analysis, the Ninth Circuit had itself applied an evenhanded standard. *See* 748 F.2d at 525-26.

The Ninth Circuit also failed to consider the fact that Congress knew how to differentiate between plaintiffs and defendants in awarding attorney's fees when it wanted different standards to apply. Under the Government in the Sunshine Act, litigation costs, including attorney's fees, may be awarded to the substantially prevailing party, "except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes." 5 U.S.C. § 552b(i). Similarly, under the Natural Gas Pipeline Safety Act, 49 U.S.C. § 60121(b), a court may, "in the interests of justice," award attorney's fees in citizen suits to a prevailing plaintiff, but a prevailing defendant may be awarded such costs only if the plaintiff's action was "unreasonable, frivolous, or meritless." As a further example, in cases involv-

ing antitrust claims under the National Cooperative Research and Production Act, Congress provided that the district court "shall"

> (1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or
>
> (2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, *if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith.*

15 U.S.C. § 4304(a) (emphasis added); *see also* 15 U.S.C. § 15c(d) (in antitrust actions brought by a state, courts may award fees to prevailing defendant if "the State attorney general has acted in bad faith, vexatiously, wantonly, or for oppressive reasons"); 31 U.S.C. § 3730(d)(4) (in *qui tam* action courts may award fees to prevailing defendant if plaintiff's claim "was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment"); 42 U.S.C. § 11113 (in antitrust actions under Health Care Quality Improvement Act, courts shall award fees to prevailing defendant if plaintiff's claim was "frivolous, unreasonable, without foundation, or in bad faith"); 15 U.S.C. § 1692k(a)(3) (in private action under Fair Debt Collection Practices Act, courts "may award" fees to a successful defendant on a finding that plaintiff's action "was brought in bad faith and for the purpose of harassment"); 15 U.S.C. § 1693m(f) (courts "shall" award fees to prevailing defendant in private action under the Electronic Fund Transfer Act upon finding that the "unsuccessful action" was brought "in bad faith or for purposes of harassment"); 15 U.S. C. §§ 3608(d), 3611(d) (defendant in suit under Condominium and Cooperative Abuse Relief Act may recover reasonable fees where court finds that plaintiff's action was "frivolous, malicious, or lacking in substantial merit"). In sharp contrast to these statutes, Congress

made no distinction between plaintiffs and defendants when it enacted the fee shifting provision of the ESA. This strongly supports the conclusion that Congress did not intend the dual standard that has been adopted by the Ninth Circuit in this case.

Finally, the Ninth Circuit applied the *Christiansburg* standard in reliance on this Court's decision in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, which, according to the Ninth Circuit, had "essentially overruled" its own decision in *Carson-Truckee*. Pet. App. at 8a. *Amici* submit that the Ninth Circuit misinterpreted *Delaware Valley*, especially in view of the more recent *Fogerty* decision. First, the issue in *Delaware Valley* was not whether *Christiansburg* should be applied to prevailing defendants in environmental litigation. Rather, the issue was whether a prevailing plaintiff could recover attorney's fees for participation in an administrative proceeding, and whether the district court improperly increased fees above the lodestar. *See* 478 U.S. at 557-58. Furthermore, insofar as *dicta* in *Delaware Valley* suggests that the fee shifting provisions in civil rights and environmental legislation should be interpreted similarly, *Fogerty* counsels that a closer and more critical examination of the structure and purposes of the statutory schemes and their similarities and differences is in order. Although the Ninth Circuit's decision here suggests a "common purpose" between the Civil Rights Act and the ESA, that statement appears to be an extrapolation from the *dicta* in *Delaware Valley* rather than the product of a thorough analysis of the two statutes. Moreover, as *amici* show in the next section, this Court's decisions subsequent to *Delaware Valley* demonstrate that private enforcement of the civil rights laws serves a fundamentally different role than citizen enforcement of the ESA and other environmental laws.

C. The Ninth Circuit's Dual Standard Is Inconsistent With Congress' Determination That Citizen Suits Are Limited To A Supplementary, Interstitial Role In Environmental Enforcement

The Ninth Circuit fundamentally misconstrued the intent of Congress when it stated that the Civil Rights Act provisions addressed in *Christiansburg* and the Endangered Species Act citizen suit provisions underlying this case "have a common purpose." *See* Pet. App. at 8a. Although not considered by the Ninth Circuit, a predicate for *Christiansburg's* dual standard for fee shifting was the fact that the individual private plaintiffs favored by the dual standard were "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg*, 434 U.S. at 418 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)); *see also* H.R. Rep. No. 94-1558, at 1 (1976) ("[T]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens."). In stark contrast, there is nothing in the legislative history of the Endangered Species Act (or any other environmental statute) to suggest that private plaintiffs were Congress' chosen instruments" for enforcement or that Congress intended to "depend largely on private plaintiffs" to enforce environmental laws. Quite the contrary, Congress intended a limited "interstitial" role for environmental citizen suits—"to supplement rather than supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 40, 60-61 (1987). Given the "supplementary role" Congress intended for such suits, they are proper only where government enforcement agencies "'fail to exercise their enforcement responsibility.'" *Id.* (quoting S. Rep. No. 92-414, at 64 (1971)); *see also Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989) (primary responsibility for enforcing environmental laws is vested in government agencies, "thus obviating

the need for citizen suits"). Thus, far from sharing a common purpose, the private enforcement provisions of the federal civil rights and environmental laws have very different purposes.[6]

The Ninth Circuit's dual standard has the pernicious effect of encouraging the "potentially intrusive" and burdensome citizen suit litigation that Congress intended to avoid. *See Hallstrom*, 493 U.S. at 29; *Gwaltney*, 484 U.S. at 61. This case is a clear example. Nothing in the various ESA and NEPA claims that Respondents pursued against PALCO and the federal government amounted to a serious question justifying litigation, as the Ninth Circuit repeatedly acknowledged. *See, e.g.*, Pet. App. at 45a (rejecting Respondents' strained argument "that the State of California can somehow 'delegate' its authority to influence private action to the federal government"); *see also supra* p. 8. In fact, EPIC's claims, if they had been sustained by the courts, would have clearly undermined the ESA's objectives, while the actions of Petitioners challenged below by EPIC most assuredly advanced the protections to which the ESA is directed. The court of appeals emphasized these points in rejecting EPIC's ESA contentions as untenable:

> Protection of endangered species would not be enhanced by a rule which would require a federal agency to perform

---

[6] Nor are environmental citizen suit plaintiffs analogous to the "'impecunious" plaintiffs that have often been the object of civil rights violations. *See Fogerty*, 510 U.S. at 524; *see also Christiansburg*, 434 U.S. at 420 ("plaintiff[s] of limited means'" are the focus of the Civil Rights Act's fee shifting provision) (quoting Remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964)). Environmental citizen suits, on the other hand, are frequently brought by large organizations with substantial budgets and equally substantial membership bases. *See* Pet. at 20-21. In fact, the forestry property that underlies this case has alone been the subject of more than 15 lawsuits by Respondent EPIC. *See id.* at 6 n.7.

As a further indication of the very different posture of civil rights suits in comparison to environmental citizen suits, a civil rights plaintiff is eligible for a fee award even if its success was only nominal or technical in nature, *see Christiansburg*, 434 U.S. at 416, while fee shifting in environmental citizen suits is not authorized where litigation success was merely technical or procedural. *Ruckelshaus*, 463 U.S. at 688 n.9.

> the burdensome procedural tasks mandated by section 7 simply because it advised or consulted with a private party. Such a rule would be a disincentive for the agency to give such advice or consultation. Moreover, private parties who wanted advice on how to comply with the ESA would be loath to contact the USFWS for fear of triggering burdensome bureaucratic procedures. As a result, desirable communication between private entities and federal agencies on how to comply with the ESA would be stifled, *and protection of threatened and endangered species would suffer.*

Pet. App. at 83a (emphasis added). The Ninth Circuit's dual standard for fee shifting clearly encourages such counterproductive litigation.

Simply put, Congress' determination that environmental citizen suits, such as suits under ESA section 11(g)(4), should serve a "supplementary" or secondary role, *see Gwaltney*, 484 U.S. at 60, cannot be squared with the Ninth Circuit's position diminishing the value of a vigorous defense challenging untenable claims, such as those presented in this case by Respondents. It thus bears emphasis that the ESA has various goals which are quite distinct from citizen suit enforcement, such as voluntary, incentive-based conservation programs, *see* 16 U.S.C. § 1531(a)(5),[7] and placing principal enforcement responsibility with the secretaries of the Departments of Commerce and Interior. *See* 16 U.S.C. § 1540(e), (g)(2) (enforcement by United States precludes citizen suit). Given those distinct goals, citizen suit "defendants who seek to advance . . . meritorious . . . defenses [thereby vindicating the ESA's other goals] should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims." *Fogerty*, 510 U.S. at 527.

---

[7] *See also Hallstrom*, 493 U.S. at 29 (achieving compliance through administrative action "eliminate[s] the need for any access to the courts").

Finally, the evenhanded fee shifting standard advocated by Petitioners and *amici* will not deter meritorious citizen suit claims and will protect various interests that EPIC can be expected to raise in opposition to the petition in this case. In that regard, it should be noted that fee awards are not a matter of right and are, instead, discretionary with the district courts. There is no precise rule or formula for such determinations—the district courts exercise their discretion in light of a variety of equitable considerations and based on the circumstances of the case. *See Hensley v. Eckerhart*, 461 U.S. 424, 436-37 (1983); *see also Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 195 (3d Cir. 1988) (given that fee shifting is discretionary, equitable considerations govern). The plaintiff's ability to pay, impact on its ability to bring meritorious suits, and other factors may be appropriate considerations in a given case and would affect a fee award to a prevailing defendant. *See* 857 F.2d at 197; *see also Baker v. Dandar*, 158 F.3d 516, 528-29 (11th Cir. 1998). The Ninth Circuit's dual standard, on the other hand, preempts consideration of such factors regardless of the circumstances, and, in practical effect, means that a prevailing citizen suit defendant will rarely, if ever, recover its fees.

In sum, the Ninth Circuit's dual standard for fee shifting in environmental citizen suits creates considerable uncertainty and raises significant issues that will continue to be litigated until resolved by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT M. DUBOFF*
JEFFREY D. KOMAROW
WRIGHT & TALISMAN, P.C.
1200 G STREET, N.W.
SUITE 600
WASHINGTON, DC 20005-3802
(202) 393-1200

Counsel for Amici Curiae
American Forest & Paper
Association, et al.

**Counsel of Record*